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Comments

ADMISSIBILITY OF CONFESSIONS OF GUILT IN MISSOURI

A confession is ordinarily defined as "an acknowledgment by accused in a criminal case of his guilt of the crime charged."¹ A mere admission of certain facts or circumstances connected with the crime or facts from which the guilt of the crime

1. 22 C.J.S., *Criminal Law* § 816 (1940).

might be inferred will not constitute a confession.² From this it will logically follow that the confession must be made after the actual crime has been committed,³ and the confession must be of such a nature that only an inference of complete guilt, and nothing less, may be drawn therefrom.⁴

The greatest problem concerning confessions which has eternally plagued our courts has been whether any given confession is trustworthy. Professor Wigmore has observed our massive collection of rules restricting the admission of confessions as a concerted effort on the part of our courts and legislatures to prevent false confessions.⁵ From this fear of false confessions, emanated our two basic prerequisites of admissibility, to-wit, that the confessions be voluntary and that they be, to some extent, corroborated by independent evidence.

There are other circumstances under which a given confession may be false or unreliable, but these circumstances are much more difficult, if not impossible, to guard against. Among these situations we find instances in which the confessor deliberately lies in order to shield the real culprit, or where he has committed one crime, and, out of hope for leniency, confesses to another similar crime of which he also has been accused. There is also the possibility that the confessor is suffering from some mental infirmity which causes him to believe that he really did commit the crime of which he is accused. A further difficulty in determining the reliability of confessions is evidenced by the alarming number of persons who allege that they are guilty of a rather brutal and highly publicized crime which has recently been committed.

Confessions prompted under the aforementioned circumstances are very difficult to guard against, and their falsity is often difficult to establish. It is submitted, though, that these are very exceptional cases, and the fact that men are generally strongly motivated by the desire for self-protection will operate strongly to prevent false confessions. Therefore, there is strong justification for admissibility if the requirements of corroboration and lack of coercion are complied with.⁶

VOLUNTARINESS

In Missouri, as in most jurisdictions, there is a requirement that a confession be voluntary as a prerequisite to admissibility as evidence of the guilt of the accused.⁷ For that reason, we will next direct an inquiry as to what factors, if present, will cause a confession to be deemed involuntary and therefore inadmissible.

Under the *McNabb* case, it seems that a confession will be deemed inadmissible in federal courts if illicitly while the accused was held improperly, without process,

2. *State v. Jackson*, 95 Mo. 623, 8 S.W. 749 (1888).

3. See note 1 *supra*.

4. *People v. Ferdinand*, 194 Cal. 555, 229 Pac. 341 (1924).

5. 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

6. MCCORMICK, EVIDENCE § 109 (1954).

7. *State v. Sanford*, 354 Mo. 1012, 193 S.W.2d 35 (1946) (en banc), cert. denied, 328 U.S. 873 (1946); *State v. Ellis*, 354 Mo. 998, 193 S.W.2d 31 (1946) (en banc).

and had not been given an opportunity to be taken before a United States judge or commissioner.⁸ In Missouri it appears that the fact the accused was under arrest when the confession was given, does not, in itself, seem to be sufficient to deem it to be involuntary or cause it to be excluded.⁹ It may also be said, that, contrary to the doctrine of the *McNabb* case, Missouri courts will not deem a confession inadmissible for the sole reason that the accused was being held illegally when the confession was illicit.¹⁰

In the nineteenth century in England, there was a requirement that the accused be cautioned as to his rights before making the confession, and if this caution was insufficient, then the admissibility of the confession might be impaired.¹¹ In contrast, such a requirement does not exist in Missouri, and the fact the accused is not warned that his confession may be used against him will not be sufficient, in itself, to denominate it as being involuntary, and therefore inadmissible.¹² Further, the fact that the accused was neither represented by counsel nor advised that he was entitled to consult counsel would not, alone, cause a confession given by him to be held involuntary and therefore inadmissible.¹³

One of the most common factors that will cause a confession to be considered to have been made involuntarily occurs when the confession is made in reliance upon or prompted by promises of immunity or reward or some other type of inducement. Although confessions of this type are usually inadmissible, this cannot be considered to be categorically true; it is necessary to look to the particular type of promise or inducement and look to the person making the promise, before its coerciveness can be accurately determined.

Before a confession will be deemed involuntary because it was induced by a promise of a future benefit, it is generally felt that the promise must refer to escape from, or mitigation of punishment for the crime the confessor is accused of committing.¹⁴ Although this be true, the promise need not necessarily refer to a complete

8. *McNabb v. United States*, 318 U.S. 332 (1943).

9. *State v. Tillett*, 233 S.W.2d 690 (Mo. 1950); *State v. Aitkens*, 352 Mo. 746, 179 S.W.2d 84 (1944); *State v. Pillow*, 169 S.W.2d 414 (Mo. 1943); *State v. Christup*, 337 Mo. 776, 85 S.W.2d 1024 (1935); *State v. Bundy*, 44 S.W.2d 121 (Mo. 1931); *State v. McGuire*, 327 Mo. 1176, 39 S.W.2d 523 (1931); *State v. Hoskins*, 327 Mo. 313, 36 S.W.2d 909 (1931); *State v. McCord*, 237 Mo. 242, 140 S.W. 885 (1911); *State v. Armstrong*, 203 Mo. 554, 102 S.W. 503 (1907).

10. *State v. Francies*, 295 S.W.2d 8 (Mo. 1956); *State v. Bradford*, 362 Mo. 226, 240 S.W.2d 930 (1951); *State v. Lee*, 361 Mo. 163, 233 S.W.2d 666 (1950); *State v. Sanford*, *supra* note 7; *State v. Raftery*, 252 Mo. 72, 158 S.W. 585 (1913); *State v. Thomas*, 250 Mo. 189, 157 S.W. 330 (1913).

11. See 3 WIGMORE, EVIDENCE §§ 817-20, 842-47 (3d ed. 1940).

12. *State v. Pippin*, 357 Mo. 456, 209 S.W.2d 132 (1958); *State v. Evans*, 345 Mo. 398, 133 S.W.2d 389 (1939); *State v. McGuire*, *supra* note 9; *State v. Hoskins*, *supra* note 9; *State v. Johnson*, 316 Mo. 86, 289 S.W. 847 (1926).

13. *State v. Pippin*, *supra* note 12; *State v. Evans*, *supra* note 12; *State v. McGuire*, *supra* note 9.

14. *State v. Williamson*, 339 Mo. 1038, 99 S.W.2d 76 (1936); *State v. Ball*, 262 S.W. 1043 (Mo. 1924); *State v. Hart*, 237 S.W. 473 (Mo. 1922); *State v. Wooley*, 215 Mo. 620, 115 S.W. 417 (1909); *State v. Hunter*, 181 Mo. 316, 80 S.W. 955 (1904); *State v. Murphey*, 146 Mo. App. 707, 125 S.W. 557 (St. L. Ct. App. 1910).

escape from punishment, but some hope of leniency or clemency has been deemed to be sufficient.¹⁵ On the other hand, it appears that a promise merely concerning greater personal comfort or concerning the granting of some benefit to a third person will not be sufficient to cause the confession to be considered involuntary.¹⁶ It is generally felt that the promise need not relate to a specific advantage in order to be inadmissible; it is sufficient if the promise is suggestive enough of advantage to be gained to induce a hope as to some leniency in punishment for the crime committed, thus causing the confession to be made.¹⁷ The fact that there is some collateral inducement, unrelated to punishment for the crime accused, will not, alone, cause a confession made in reliance thereon to be deemed inadmissible.¹⁸

One must bear in mind that, in order for a confession to be deemed involuntary because of a promise of leniency or other related benefit, the promise must be the factor inducing a confession made in reliance thereon. Therefore, the promise must be made before the confession is given; if the promise is made subsequent to the confession, it would not render such a confession involuntary.¹⁹ It also follows that, in order for such a promise to be a bar to admissibility, it must be made by someone having authority in order for it to be reasonable for the accused to believe that the person making the promise has the power to confer the promised benefit.²⁰

Although promises of the aforementioned nature cause a confession to be deemed involuntary, the fact that the confession was obtained through the use of artifice, falsehood, deception, or cunning will not affect its admissibility.²¹ Probably the most common trick used by law enforcement officers to obtain a confession is that of telling the accused that his accomplices in the crime have been arrested or that his accomplices have already confessed to their participation in the crime and have implicated the accused. Missouri courts have held that confessions procured through this type of artifice will not cause the confession to be considered involuntary or inadmissible.²² One might conclude, therefore, that if any artifice or falsehood is used, and if such artifice falls short of being considered a promise or inducement concerning mitigation of punishment, it will not affect the admissibility of a confession caused thereby.²³

15. See note 14 *supra*.

16. *State v. King*, 342 Mo. 1067, 119 S.W.2d 322 (1938); *State v. Williamson*, *supra* note 14.

17. *State v. Williamson*, *supra* note 14.

18. *State v. Hopkirk*, 84 Mo. 278 (1884).

19. *State v. Williamson*, *supra* note 14; *State v. Meyer*, 293 Mo. 108, 238 S.W. 457 (1922).

20. *State v. Williamson*, *supra* note 14; *State v. Hart*, *supra* note 14; *State v. Spough*, 200 Mo. 571, 98 S.W. 55 (1906).

21. *State v. Meyer*, *supra* note 19; *State v. Wilson*, 172 Mo. 420, 72 S.W. 696 (1903) (en banc); *State v. Rush*, 95 Mo. 199, 8 S.W. 221 (1888); *State v. Fredericks*, 85 Mo. 145 (1884); *State v. Phelps*, 74 Mo. 128 (1881); *State v. Jones*, 54 Mo. 478 (1874).

22. See note 21 *supra*.

23. *Ibid*.

Most often confessions are illicitly obtained from the accused by way of normal interrogation by police officers while accused is in custody. In England such confessions would be inadmissible because of the fact that the practice of the questioning of individuals in custody charged with a crime by police is not permitted and is looked upon with great disfavor.²⁴ On the contrary, in Missouri the sole fact that a confession is the result of reasonable questioning by police officers will not cause it to be inadmissible provided there is an absence of other factors that would cause the confession to be involuntarily given.²⁵ On the other hand, it appears that if the questioning is long and protracted and the police use sweating and other coercive techniques, a subsequent confession extracted in that manner will usually be considered inadmissible as being involuntary.²⁶

Another factor that will often cause a confession to be involuntarily given occurs when the confession is illicitly obtained through threats of bodily harm or by means of physical violence.²⁷ Although Missouri courts have not passed upon a great variety of situations in which a confession was illicitly obtained by threats, it appears that to render a confession involuntary, the threat must be directed against the confessor rather than to against a third person.²⁸ It has also been held that the threat of harm caused by an outside agency, such as the fear of mob violence, will be sufficient to cause the confession so elicited to be inadmissible as being given involuntarily.²⁹ Confessions elicited by physical violence or by the beating of the accused by police officers have been considered inadmissible due to their involuntary nature,³⁰ notwithstanding the fact that such conduct on the part of law enforcement officers is prohibited by statute.³¹ It has been further held that a confession prompted by mental punishment will cause it to be deemed involuntary the same as a confession prompted by physical violence.³²

CORROBORATION

The second great safeguard against the admission of a false confession is the requirement that a confession in order to be admissible must in some manner be corroborated by independent evidence. This type of prerequisite will prevent a mentally deficient person from being convicted of a crime that was never, in fact,

24. *Rex v. Treacey*, [1944] 2 All E.R. 229 (C.A.).

25. *State v. Pillow*, 169 S.W.2d 414 (Mo. 1943); *State v. Hoskins*, 327 Mo. 313, 36 S.W.2d 909 (1931); *State v. Hart*, 237 S.W. 473 (Mo. 1922); *State v. Thomas*, 250 Mo. 189, 157 S.W. 330 (1913).

26. *State v. Butts*, 349 Mo. 213, 159 S.W.2d 790 (1942) (continuous questioning throughout the night and other coercion); *State v. Powell*, 266 Mo. 100, 180 S.W. 851 (1915) (accused continuously sweated and questioned for twelve hours).

27. *State v. Hoskins*, *supra* note 25; *State v. Nagle*, 326 Mo. 661, 32 S.W.2d 596 (1930); *State v. Hart*, *supra* note 25; *State v. Wooley*, 215 Mo. 620, 115 S.W. 417 (1909); *State v. Hopkirk*, 84 Mo. 278 (1884); *Hector v. State*, 2 Mo. 135 (1829).

28. *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938).

29. *State v. Hart*, *supra* note 25; *State v. Moore*, 160 Mo. 443, 61 S.W. 199 (1901).

30. *State v. Nagle*, *supra* note 27; *State v. Hart*, *supra* note 25; *State v. Wooley*, *supra* note 27.

31. § 558.360, RSMo 1949.

32. *State v. Bradford*, 262 S.W.2d 584 (Mo. 1953).

committed or, in some jurisdictions, from conviction of a crime that it would be impossible for the accused to have committed. A few jurisdictions require a full corroboration, including confirmation of the criminal participation of the accused himself, but most jurisdictions have a more flexible requirement.³³ For the purposes of this comment, the discussion will be limited to Missouri's corroborative requirements.

In Missouri, it appears the requirements as to corroboration of the confession will be fully met by independent proof of the *corpus delicti*. That is to say, independent proof is required to show that the harm or injury actually occurred, and that its cause was criminal in origin.³⁴ Although this requirement exists, it appears the *corpus delicti* need not be fully proved independently, and it will be sufficient that the outside evidence, together with the confession, proves the guilt beyond a reasonable doubt.³⁵ It has even been said that only slight corroboration may, in some circumstances, be sufficient,³⁶ but under any circumstances, it seems well established that it is only necessary to prove independently that the crime was committed by *someone*, and not necessarily that it was committed by the accused.³⁷

One must bear in mind that the preceeding discussion concerning the extent of corroboration necessarily deals exclusively with the prerequisites to the admissibility of the confession into evidence. Once the confession has been admitted into evidence, it is fully within the province of the jury to give as much weight and credence to the confession as they see fit, in view of all the circumstances.³⁸ For this reason, it would be most advisable for a prosecutor to corroborate a confession that has been obtained to as great an extent as possible in order to more fully insure that he may obtain his desired conviction. Probably the ideal situation, from a practical point of view, would be one in which the prosecutor could fully sustain his burden of proof without the use of a confession. That is to say, the confession would be corroborated to the fullest possible extent; the confession would merely add to the certainty of the conviction, and the guilt of the accused would have been fully proven without its use. In that way a subsequent finding by the jury that the confession was involuntarily given would not impair the conviction of the accused, or the admission of a coerced confession would be less likely to constitute reversible error.

DETERMINATION OF ADMISSIBILITY

As to the method by which the question of the admissibility of a given confession is determined, one may start with the basic proposition that the admissibility of

33. McCORMICK, EVIDENCE § 110 (1954).

34. *State v. Gillman*, 329 Mo. 306, 44 S.W.2d 146 (1931).

35. *State v. Lyle*, 353 Mo. 386, 182 S.W.2d 530 (1944); *State v. Meadows*, 330 Mo. 1020, 51 S.W.2d 1033 (1932); *St. Louis v. Watters*, 289 S.W.2d 444 (St. L. Ct. App. 1956).

36. *State v. McQuinn*, 361 Mo. 631, 235 S.W.2d 396 (1951).

37. *State v. Hardy*, 276 S.W.2d 90 (Mo. 1955) (en banc); *State v. Hawkins*, 165 S.W.2d 644 (Mo. 1942).

38. *State v. Hollenscheit*, 61 Mo. 302 (1875); *Bower v. State*, 5 Mo. 364 (1838).

such evidence is a question of law to be determined by the court. From this genesis, we find that, in most cases, a simple determination by the court as to the question of admissibility will not adequately handle the problem and the court, of necessity, will have to use a more detailed and accurate procedure in order correctly to pass upon the issue.

As is the case with most areas of evidence, the right to have an inadmissible confession excluded may be waived by the defendant. For that reason, the defendant must object to the admissibility of the confession when it is introduced, and failure to do so will constitute a waiver of his privilege to have it excluded. In Missouri there is an initial presumption that the confession offered was made voluntarily and is therefore admissible unless objection is raised.³⁹

Usually the defendant will accompany his objection to the introduction of the confession with a request that the court make a preliminary inquiry as to the question of admissibility out of the presence of the jury. At this preliminary hearing, however, the state has the burden of proof in showing that the confession was voluntarily made and therefore should be admitted into evidence.⁴⁰ It appears, therefore, that the presumption that the confession was voluntarily given will exist only until the defendant objects to its introduction and requests a preliminary hearing upon the question, after which the state will have to prove its voluntariness.

At the hearing, the state will introduce testimony reflecting how the confession was obtained, and the defendant has the privilege of introducing evidence in rebuttal to show the involuntary nature of the confession.⁴¹ Upon hearing both sides of the inquiry, the court has the duty of deciding the mixed question of law and fact as to whether the confession is admissible as being voluntarily given.⁴² If there is a showing that the confession was involuntarily made, then the court will rule to exclude it. On the other hand, if it is shown to be voluntary, it will be admitted. Very often there will be a very close question with respect to voluntariness, and in such situations the Missouri courts have adopted the practice of submitting the issue of voluntariness to the jury for their determination.⁴³

If the voluntariness question is to be left to the jury to determine, the state, once again, will have the burden of proving the voluntary character of the confession and the accused will have the privilege of introducing evidence in rebuttal.⁴⁴ After

39. *State v. Higdon*, 356 Mo. 1058, 204 S.W.2d 754 (1947); *State v. Roland*, 336 Mo. 563, 79 S.W.2d 1050 (1935); *State v. Hershon*, 329 Mo. 469, 45 S.W.2d 60 (1932); *State v. Midkiff*, 278 S.W. 681 (Mo. 1925); *State v. Reich*, 293 Mo. 415, 239 S.W. 835 (1922); *State v. Hart*, 237 S.W. 473 (Mo. 1922); *State v. Meyers*, 99 Mo. 107, 12 S.W. 516 (1889).

40. *State v. Bunton*, 291 S.W.2d 122 (Mo. 1956); *State v. Bradford*, 262 S.W.2d 584 (Mo. 1953); *State v. Humphrey*, 357 Mo. 824, 210 S.W.2d 1002 (1948); *State v. Higdon*, *supra* note 39; *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938).

41. *State v. Thomas*, 250 Mo. 189, 157 S.W. 330 (1913); *State v. Kinder*, 96 Mo. 548, 10 S.W. 77 (1888).

42. *State v. Bradford*, 262 S.W.2d 584 (Mo. 1953); *State v. Pierce*, 236 S.W.2d 314 (Mo. 1951); *State v. Humphrey*, *supra* note 40; *State v. Di Stefano*, 152 S.W.2d 20 (Mo. 1941).

43. *State v. Bradford*, *supra* note 42; *State v. Di Stefano*, *supra* note 42.

hearing all the evidence, the jury, during deliberation, will decide the question of voluntariness and thereby either accept or reject the confession.

Once a confession has been deemed admissible, either by the court or upon submission to the jury, there still exists the problem of the amount of credence that will be given thereto by the jury. The fact that the confession is admitted into evidence does not constitute an automatic command to the jury that they must believe the substance contained therein. On the contrary, the jury may attach whatever weight they choose, as to any parts thereof or to the whole confession.⁴⁴ It is given, by the law, no greater preference than any other type of proof of guilt. Therefore, as stated previously, the mere fact that the confession is accepted as evidence, will not always operate as a complete guaranty of a conviction.

CONCLUSION

As has been pointed out, the greatest danger in the very admissibility of confessions lies in the possibility that the confession may be false. On the other hand, the strongest reasons for allowing the admissibility of confessions lie in the great interest in efficient law enforcement and in the necessity that persons guilty of crimes be convicted and punished. Admittedly, there are many instances in which conviction without the aid of a confession would be virtually impossible because of the nature of the crime and the difficulty in securing outside, independent evidence adequate alone to prove guilt.

With this in mind, it can be seen that the ultimate purpose in establishing rules concerning the admissibility of confessions will be adequate to balance the right of individuals not to be coerced into confessing crimes which they did not commit, against the public interest in facilitating and achieving the punishment of criminals. The result will be that whenever courts act to protect one interest, the action will usually be at the expense of the other interest, but with a continuing attempt to achieve an adequate balance of interests at all times.

As to the future of confessions in Missouri, there does not appear to be a definite trend in one direction or the other. There does not appear to be a tendency to accept the *McNabb* doctrine, nor does there appear to be a trend in the direction of liberalizing the admissibility requirements of confessions. Any future restrictions upon the admissibility of confessions would probably be prompted by the use of coercive, strong-arm tactics by our law enforcement officers in order to obtain confessions from criminal suspects. It may be concluded, therefore, that as long as the personal liberties of persons are respected by law enforcement officers and cases of forced confessions are kept at a minimum, the use of the confession as evidence of guilt will not be further limited or impaired.

WILLIAM M. HOWARD

44. See notes 40, 41 *supra*.

45. See note 38 *supra*.

INTERPLEADER UNDER THE MISSOURI CIVIL CODE

HISTORY—DEVELOPMENT OF THE EQUITABLE REMEDY

In restricted instances the remedy of interpleader was known at early common law. Since there were many situations in which the use of such a procedure was justified, and yet the remedy at law was extremely narrow, equity began to take jurisdiction on the ground that there was no adequate remedy at law. As the chancellor assumed these cases, the existence of interpleader at law faded away, and interpleader slowly developed as an equitable remedy.¹

From a purely theoretical point of view equitable interpleader existed in the situation where the proceeds of a dispute were in the possession of a disinterested third party. Such a holder, in order to save himself from vexatious multiple litigation, could file a bill of interpleader in equity, pay the proceeds of the dispute into court, and compel the litigants to settle the dispute among themselves. The interpleader had but one obligation which two or more persons claimed. Interpleader was the solution to his dilemma.

However, as the remedy developed in equity in the 18th and 19th centuries, certain rigid and strict rules grew up around it which to a great extent impaired its usefulness. These rules were in the nature of conditions which either had to exist, or could not exist, before a person would be permitted to interplead. They were the tests by which the courts determined whether the remedy would lie in any given case. As these requirements developed and crystallized, interpleader as a remedy became a complicated, technical problem. The classic statement of these rules, and the conventional starting point of almost any discussion of interpleader, is that of Pomeroy:

... from the whole course of authorities, it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions:

1. The same thing, debt, or duty must be claimed by both or all of the parties against whom relief is demanded [identity];
2. All their adverse titles or claims must be dependent or be derived from a common source [privity];
3. The person asking the relief—the plaintiff—must not have or claim any interest in the subject-matter [disinterestedness];
4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder [freedom from independent liability].²

Pomeroy's statement is the distillation of several centuries of growth and develop-

1. Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814 (1921); Buder, *Interpleader in Missouri*, 7 MO. L. REV. 203 (1942).

2. 4 POMEROY, *EQUITY JURISPRUDENCE* § 1322 (4th ed. 1919).

ment of equitable interpleader.³ It represents the pure equitable remedy, without the impingement of any statutory modification. Many of these requirements were the result of historical precedent that had carried through the law of interpleader since its very beginning. Professor Chafee traces the historical basis and tortuous case growth of each of these elements, attributing some of them, at least, to inarticulate attempts by chancellors to express the true nature of interpleader.⁴ In any event, as interpleader hardened as a proceeding, these four requisites became the elements of the remedy. Their very existence hampered the use of this proceeding as a flexible instrument by which the rights of parties could be finally adjudicated. A great deal of litigation was precipitated solely over the issue of whether they did or did not properly exist in a case. Many commentators criticized the continued application of these tests to the remedy as an unjustified practice;⁵ and the courts, in attempts to avoid harsh results in many cases, would circumvent their application, resulting in difficult and conflicting case law.

Prior to the adoption of the Missouri civil code, the requirements stated by Pomeroy were applied by Missouri courts. The application of these elements is discussed in detail in "Interpleader in Missouri,"⁶ written shortly before the adoption of the Missouri civil code. The article takes each of the four elements of equitable interpleader (identity, privity, disinterestedness, and freedom from independent liability) and discusses the degree to which they were accepted, applied, or rejected by the Missouri courts.

STATUTORY MODIFICATION OF INTERPLEADER

Interpleader as it finally matured in equity has been subject to extensive statutory modification. The strong criticism against the technical nature of the action which destroyed much of its flexibility, and the liberalizing effect of modern procedural codes have resulted in a considerable broadening of the remedy.

The Missouri statutory provision on interpleader reads as follows:

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but

3. In addition to these absolute requirements which equity imposed there were certain other principles which might bar interpleader if they were found to exist in a given case. Briefly, they were: (1) If either of the two claims were groundless, relief would be refused; (2) If the applicant was in collusion with either party, relief would be denied; (3) The res must be put into court or put at the court's disposal; (4) The applicant must not have been placed in his precarious position through his own fault; and (5) Equity must have the power to enjoin the claimants from prosecuting their claims. Chafee, *supra* note 1, at 819-21.

4. *Ibid.*

5. *Id.* at 822. In one instance Professor Chafee calls these requirements "anti-quarrian and metaphysical incrustations."

6. *Supra* note 1.

are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in section 507.040.⁷

This statute is a verbatim copy of rule 22(1) of the Federal Rules of Civil Procedure. This rule has been said to be the broadest and most liberal interpleader procedure to be found today.⁸ And it has been frequently stated that this rule has abolished all of the technical requirements which equity imposed as a condition precedent to relief.⁹ The statute encompasses both the strict bill of interpleader and the bill in the nature of interpleader as these remedies existed in equity.¹⁰

An interesting comparison, bearing upon the scope of interpleader in Missouri today, may be made between the theoretical basis of equitable interpleader and statutory interpleader. Equitable interpleader was designed for a number of particular factual situations. A person who found himself in a position in which he owed some debt or obligation and who was not certain to which of several claimants he was liable could seek the aid of equity. Statutory interpleader, however, is more of a procedural joinder device in theory. It includes the situations in which equity would grant relief but it is much broader in its concept. The committee which drew rule 22 of the Federal Rules of Civil Procedure said of rule 22:

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. . . .¹¹

Moore in discussing this rule says:

Rule 20 (Permissive Joinder of Parties) authorizes the alternative joinder as

7. § 507.060, RSMo 1949. This section was enacted as part of the Missouri code for civil procedure becoming effective January 1, 1945. Prior to the adoption of this section Missouri had passed a number of statutes which dealt with the interpleader problem. These statutes provided for the remedy of interpleader in specific instances. They merely supplemented the remedy as it existed in equity and did not materially change its nature. They are: §§ 362.360, 363.590 (banks and trust companies), 406.170 (warehousemen), 407.210-230 (carriers), 443.220 (mortgage foreclosure actions), 521.520 (attachments), 525.090, .100, .120 (garnishment), RSMo 1949.

8. CLARK, CODE PLEADING § 66 (2d ed. 1947).

9. 3 MOORE, *FEDERAL PRACTICE* ¶ 22.04[1], at 3007 (2d ed. 1948); 2 BARRON AND HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 551 (1950); *Class Actions and Interpleader: California Procedure and Federal Rules*, 6 STAN. L. REV. 120, 150 (1953).

10. A bill in the nature of interpleader was a device used to get around some of the technical requirements of a strict action of interpleader. It was based upon some other grounds of equity jurisdiction. If an applicant for interpleader could get into equity on some ground other than double vexation, he could get interpleader without meeting some or all of the technical requirements.

11. RULES OF CIVIL PROCEDURE, ANNOTATED 34 (1938) (advisory committee note following rule 22). This committee note also appears in 3 MOORE, *FEDERAL PRACTICE* ¶ 22.01[2], at 3002 (1948).

plaintiffs of two or more persons, where they are in doubt as to which one possesses the right; and the alternative joinder as defendants of two or more persons, where the plaintiff is in doubt as to which one is liable. Rule 22(1) authorizes a joinder in the converse situation, where two or more persons are claiming against a third, and allows the third to obtain a binding declaration of whether he is liable, and if so, to whom and to what extent. Thus it supplements Rule 20.¹²

This difference in the rationale between the two types of interpleader should have some bearing, it would seem, on the scope of interpleader as a remedy today.

Having discussed the historical background of interpleader, and its statutory modification, the problem to be discussed in this paper may now be presented: What is the effect on the remedy of interpleader of the adoption of the Missouri statutory provision on interpleader? The Missouri appellate cases decided since this statute went into effect supply the answer to this problem.

MISSOURI CASES UNDER THE CIVIL CODE

Before discussing the case by case development of statutory interpleader in Missouri, an introduction to terminology will be helpful. Professor Chafee has originated a method of designating parties which facilitates the discussion of cases in this field.¹³ The person requesting interpleader is called the applicant (A) and the parties who are claiming from him are designated claimants (C_1 , C_2 , etc.). The Missouri cases dealing with interpleader are reviewed in the following material in their chronological order.

The first appellate case concerning the Missouri statutory provision on interpleader (hereafter referred to as section 507.060) and its impact on the remedy of interpleader in Missouri is *John A. Moore & Co. v. McConkey*.¹⁴ A was a real estate dealer who was negotiating a contract for the sale of certain real property between C_1 and C_2 . A contract for the sale was signed and earnest money of \$5,000 was deposited with A. The parties were thereafter unable to agree on the method by which the transaction was to be financed, and the time fixed for closing expired. Both C_1 and C_2 claimed the fund which A held, each maintaining that he was entitled to it under the contract of sale. A filed a petition for interpleader, and the trial court held that A was entitled to interplead the parties. One of the claimants appealed. The Kansas City Court of Appeals held that interpleader would lie. Since A was in a position in which both C_1 and C_2 claimed the earnest money from him and it would have been necessary for him to determine the right party at his peril, interpleader was the appropriate remedy. As to the nature of interpleader under the civil code, the court said:

. . . our legislature has, by enactment of Section 18, Laws Missouri 1943, page 353, [now Missouri Revised Statutes (1949), Section 507.060] . . .

12. 3 MOORE, *op. cit. supra* note 9, at 3008.

13. Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814 (1921).

14. 240 Mo. App. 198, 203 S.W.2d 512 (K.C. Ct. App. 1947).

enlarged the scope of bills of interpleader, and has liberalized the law on this subject. Section 18, *supra*, completely abolishes condition 2, as stated by Pomeroy, and also permits plaintiff to deny liability, in whole or in part, to any or all of the defendants, thus broadening and liberalizing the remedy in regard to conditions 3 and 4. . . .

We think that, by Section 18, *supra*, the forest of confusing judicial pronouncements concerning the law of interpleader has been cleared away. . . . Reference to the language of Section 18, *supra*, . . . discloses that most of the conditions heretofore required to be shown in order to maintain a bill of interpleader are thereby relegated to the scrap pile of worn out and abandoned rules no longer deemed suitable for 20th century judicial procedure.

The first sentence of the quoted statute prescribes virtually the sole test of whether or not a bill of interpleader will lie. The statute does not destroy or change the nature of the remedy of interpleader as recognized in equity; it merely broadens its scope.¹⁵

The supreme court first considered the effect of interpleader under the new statute in *Barr v. Snyder*,¹⁶ another case involving an intermediary in a real estate transaction. C_1 and C_2 , buyer and seller, had signed a contract for the sale of real estate. A controversy developed over certain furniture in the house. The contract had provided that C_1 , the buyer, was to receive all the furniture. However, C_2 , the seller, removed and sold certain pieces. The parties then requested A to handle further negotiations and to close the transaction, stating to A that they would settle the dispute over the furniture. A received the earnest money and certain of the other necessary papers. Because the fight over the furniture continued, however, the transfer was never completed. C_1 sued C_2 in conversion, joining A as a defendant. A filed a defensive interpleader which the trial court allowed. C_1 appealed, maintaining that interpleader would not lie. The court, while generally recognizing that the remedy of interpleader had been expanded in scope by the enactment of section 507.060, reserved the question of the extent of such change. Since the factual situation presented was one in which interpleader would lie before the passage of the civil code it was not necessary to the decision to develop at length the extent of enlargement of interpleader. The case does indicate, however, the feeling of the court that interpleader in Missouri today is a considerably broader remedy than as it previously existed.

In *Buerger v. Costello*,¹⁷ an owner of an undivided one half interest in a tenancy in common had leased the premises to C_1 . C_1 then subleased part of the tract, a service station, to A. C_2 , the owner of the other half of the tenancy in common, and C_1 both claimed the rent from A. A filed a petition in interpleader against the two claimants. The circuit court held that interpleader would lie, and C_1 , A's landlord, appealed maintaining that a tenant may not interplead his landlord, in an action involving rent money. There is a great deal of case authority prior to the civil codes

15. *Id.* at 203, 203 S.W.2d at 514.

16. 358 Mo. 1189, 219 S.W.2d 305 (1949).

17. 240 Mo. App. 1194, 226 S.W.2d 610 (K.C. Ct. App. 1949).

sustaining the rule that C_1 urged.¹⁸ The situation presented to the court was that covered by Pomeroy's fourth conditional element of equitable interpleader; i.e., that the applicant must have incurred no independent liability to any of the claimants.¹⁹ The Kansas City Court of Appeals held that section 507.060 had abrogated the necessity for the absence of such liability on the part of the applicant. The court said:

The language quoted is surely broad enough to embrace within its meaning a case involving landlord and tenant; and no other language appears in the statute which tends to limit it in this respect or to exclude such cases from its operation.

The following language, however, does appear therein, to wit: "It is not ground for objection to the joinder that . . . the plaintiff avers that he is not liable in whole or in part to any or all of the claimants." That provision appears to be definite and clear; and it cannot be said that landlords are immune from its effect.²⁰

The *Beurger* case has an important bearing on the problem being considered in this paper. On facts which are squarely in point it represents a holding that freedom from independent liability is no longer a conditional requirement of interpleader in Missouri. The significance of the decision will be discussed in the conclusion of this article.

In *Star-Times Publishing Co. v. Buder*,²¹ A, a corporation, found itself in a position where two rival factions claimed the interest to certain of its stock. Two brothers, C_1 and C_2 , practicing attorneys, had engaged in extensive business and financial activities together. In 1932 they sold their interest in the *St. Louis Times* to A. Part of the shares of the *Star-Times* which the brothers received in exchange in the sale had been issued to the wife of C_1 as trustee without any indication of who owned the beneficial interest therein. Over the years the relations between the claimants became strained. In 1943 C_1 asked A to transfer the share certificates involved to his three children, stating that the trust had originally been established for their benefit. C_2 maintained that neither C_1 's wife nor the children had any interest in the shares. A filed a petition in interpleader against the two rival factions seeking a declaratory judgement respecting the ownership of the stock in question. There is very little in the case dealing with the effect of the Missouri civil code on the remedy of interpleader. Almost the entire opinion is devoted to a review of

18. See Annot., 97 A.L.R. 996 (1935).

19. The applicant is liable on some independent ground not directly involved in the interpleader action to one of the claimants. A simple illustration of this is where C_1 steals C_2 's chattels and bails them to A. A is under a duty to return the property to C_2 , the rightful owner. He also has a contract of bailment with C_1 . He is "independently liable" on the contract with C_1 . If the court allows A to interplead C_1 and C_2 , there will still be the possibility (provided C_1 loses in the interpleader suit) of a separate action between A and C_1 . If it is not allowed, then A is subject to the possibility of double liability. Equity would refuse interpleader because A was under an independent liability to C_1 .

20. 240 Mo. App. at 1196, 226 S.W.2d at 611.

21. 245 S.W.2d 59 (Mo. 1952).

the evidence, involving very complicated financial transactions, to determine who was the owner of the beneficial interest in the stock. Only the last paragraph of the opinion concerns interpleader as an issue, and here the court simply holds that in an interpleader action, in the second stage of the trial, each claimant is in effect a plaintiff who must recover on the strength of his own title and not on the weakness of that of his adversary.

In *Heinrich v. South Side Nat'l Bank*,²² the issue presented was when trial court action in allowing interpleader became final in the sense that such a determination could be appealed. A, a bank, had the proceeds of a joint bank account in which one of the joint owners had died. C₁, the daughter of the decedent, who was also the surviving joint owner, brought an action against A for the proceeds of the account. The bank denied that C₁ had a beneficial interest in the account and interpleaded the beneficiaries under the decedent's will. The trial court sustained the interpleader and C₁ appealed. A's interpleader had been brought under section 362.360, one of the special interpleader statutes which Missouri had enacted before passage of the civil code. Under this statute, the interpleader does not have to pay the property in dispute into court but may refuse to do so and remain a party to the second stage of the action.²³ A maintained on appeal that the action of the trial court was not an appealable order. The court upheld A, drawing a distinction as to when a trial court decision in the first stage of an interpleader action is appealable. The basis of the court's decision was that if the action is allowed and the party pays the proceeds into court and is dismissed from the proceedings, the court's order allowing the interplea is appealable. However, if the interpleader has not been discharged but remains a party to the remainder of the litigation, there is no appealable act. The basic holding of the court is summed up by its statement to the effect that:

. . . there can still be no final judgment at the interpleader stage of the case unless the interpleader as a stakeholder pays the money into court and is discharged from the case, leaving the interpleaders to litigate for it between themselves.²⁴

The supreme court again indicates in general terms its attitude that interpleader in Missouri has been considerably broadened as a remedy, but does not specifically define the limits of such change.

The facts in *Clay County State Bank v. Simrall*²⁵ are almost exactly like those presented in the *Heinrich* case. C₁, the survivor of a joint account claimed the fund which the applicant, a bank, held. The account had been carried in the names of C₁, C₁'s father, and the father's wife. The father and his wife died. Their estates,

22. 363 Mo. 220, 250 S.W.2d 345 (1952) (en banc).

23. An interpleader suit is actually a two-step proceeding in which three parties are involved. In the first stage A's right to interpleader is litigated with the arrangement of parties being A against C₁ and C₂. If A is successful, he is discharged, and the second stage is between C₁ and C₂ over their respective rights in the disputed matter.

24. 363 Mo. at 224, 250 S.W.2d at 348.

25. 259 S.W.2d 422 (K.C. Ct. App. 1953).

C₂ and C₃, also claimed the fund from A. A instituted an interpleader action. It was allowed by the trial court and C₁ appealed. The Kansas City Court of Appeals held that the case presented was one where interpleader clearly would lie. Without discussing the nature of the remedy, the court pointed out that A held a fund to which it asserted no right and which three different parties had claimed. A was therefore entitled to seek relief from the danger of double recovery for a single liability.

The next two cases, decided by the supreme court, are the significant cases on interpleader in Missouri today. The first is *St. Louis S.W. Ry. v. Meyer*.²⁶ A, a corporation, having declared a dividend of \$5 per share on its common stock and its preferred stock, sought to declare a further dividend of \$1 per share on the outstanding shares of its capital stock. A controversy, between the common shareholders, C₁, and the preferred shareholders, C₂, developed as to whether the preferred stock had a right to participate in the extra dividend. It was not clear under the articles of incorporation and the share certificates whether the preferred shares should or should not participate. In the light of the conflicting claims, A set apart sufficient funds to pay the proposed dividend, and deposited these with a trust company. A then filed a petition for interpleader against the preferred and common shareholders individually and as class representatives. The circuit court sustained the petition, discharge A, and ordered the two contesting groups of shareholders to interplead as to their respective rights to share in the dividend fund. Some of the common shareholders, C₁, appealed, alleging among other grounds of error, that interpleader as a remedy did not lie under the facts presented. The court first considered the nature of the remedy of interpleader under the civil code. It said:

In part the appellants' arguments misconceive the nature of modern interpleader and the changes wrought by our enactment and recent adoption in Section 507.060 of Federal Rule 22. Since the questions upon this appeal arise upon the record and the proof adduced, and not on the pleadings, it is not necessary to consider, precisely, the nature and characteristics of interpleader under the statute or to attempt specific delimitation. It is sufficient for the purposes of this opinion to note that certain technical requirements, previously enforced, have been abolished and the scope of interpleader, both in form and substance, broadened.²⁷

Since, under the facts presented, there was a danger of exposure to multiple liability against A, the court held that interpleader was the proper remedy.

The remainder of the *St. Louis S.W. Ry.* case is important in that the court considers at length whether certain equitable considerations will bar interpleader. Given a fractious situation in which the remedy would ordinarily lie, can the court use its discretion to bar interpleader because of laches, collusion, or unclean hands? The answer to this question is yes. The appellant, C₁, urged that interpleader should not be granted because A had colluded with one of the claimants (its largest stockholder),

26. 364 Mo. 1057, 272 S.W.2d 249 (1954).

27. 364 Mo. at 1071, 272 S.W.2d at 254.

had itself created the situation in which it was subject to multiple claims, had not come into equity with clean hands, and was guilty of estoppel and laches. The court took each of these contentions, examined them at length under the evidence, and concluded that none of these arguments were supported by the facts. The case, however, does illustrate that interpleader in Missouri is not alone a matter of procedural joinder but that the remedy is still inherently equitable in its nature. If the remedy were not inherently equitable, the court could merely have said that these contentions did not apply.

The principal case with respect to the effect of the Missouri civil code on the remedy of interpleader is *Plaza Express Co. v. Galloway*.²⁸ In cases decided previous to this case, the supreme court had indicated in general terms its view that interpleader had been considerably broadened in scope by the enactment of section 507.060, but had never specifically defined the extent of the change. The issue was directly involved in the facts presented in this case. Bert Galloway had been injured in an automobile accident in 1951, allegedly due to the negligence of an employee of the express company. In June 1952 he instituted a personal injury action against the express company, and its purportedly negligent employee (hereafter referred to jointly as A). Shortly thereafter the plaintiff died. In November 1952, C₁, Bert's widow, brought an action against A, maintaining that the injury received in the accident resulted in Bert's death. Then in January 1953, C₂, the administrator of Bert's estate, obtained the substitution of himself in the original action brought by Bert Galloway. Under the Missouri statutes, an essential element of the administrator's claim is that the injuries received did not result in the decedent's death;²⁹ whereas an essential element of the widow's claim is that the injuries sustained by the deceased did result in his death.³⁰ The two actions pending against A were then mutually exclusive in relation to the question of whether Bert Galloway had died as a result of the injuries he received. Thus, an essential element necessary to recovery by C₁ necessarily disproved an essential element of the cause of C₂. If Bert Galloway had died as a result of the accident only the widow could recover; however, if his death was not caused by the accident only the administrator could bring an action. A, the defendants in the actions referred to above, brought interpleader, alleging that they were, or might be, exposed to multiple liability in the absence of a prior determination of whether or not the death resulted from the injuries Bert Galloway had received. The relief which A requested was a judicial determination of this question. The trial court dismissed the interpleader petition, and A appealed.

The supreme court held that interpleader would lie. In one way significant paragraph it comprehensively covers the effect of the civil code on interpleader. After setting out section 507.060, Missouri Revised Statutes (1949), it said:

The quoted language is clear and unambiguous. It requires no construction. The sole question, then, is whether plaintiffs have stated facts authoriz-

28. 365 Mo. 166, 280 S.W.2d 17 (1955) (en banc).

29. § 537.020, RSMo 1949.

30. §§ 537.080-.090, RSMo 1949.

ing the relief provided for in the statute. As we read the plain language of this statute, there are only two vital facts which must appear from the averments in the plaintiffs' statement of their claim. These are that persons have claims against the plaintiffs, and that those claims are of such a nature that plaintiffs may be exposed to "double liability." Obviously, "double liability" means "exposed to double recovery for a single liability." The other pertinent facts of the statute eliminate the necessity for the existence of facts and conditions, the existence of which was formerly necessary to the maintenance of equitable interpleader or of bills in the nature of interpleader. Thus is eliminated the necessity that the same thing, debt, or duty be claimed by each of the parties against whom relief is sought. This, because the section provides that the claims need not be identical. So, also, it is not necessary that the claims of the parties be dependent or derived from a common source because the section specifically provides that the claims may be independent of one another and that they need not have a common origin. And it is not necessary that a plaintiff, in order to use the machinery of the section, have no claim or interest in the subject matter or that he stand perfectly indifferently between the claimants in the position of a stakeholder. This, because the section provides that one seeking relief may deny liability to any or all of the claimants. Thus, while it is clear that the equitable remedies of interpleader and of bills in the nature of interpleader are encompassed within the provisions of Section 507.060, it seems equally clear that the terms of the section materially modify and extend those remedies as heretofore recognized in this state.³¹

This statement by the court clears away any doubt as to the existence of the equitable requirements of identity, privity, and denial of liability in Missouri today. These elements are no longer necessary. The single test for the existence of interpleader, as phrased by the court is *the danger of double recovery for a single liability*.

The *Plaza Express Co.* case contained several other significant points on interpleader which deserve to be noted. The court first held that the doctrine of *res judicata* would not protect A. If either C₁ or C₂ succeeded in his claim against A, the judgement obtained would not be a bar to an action by the other. The claimant who had not yet recovered was not a party to the action and would not be bound by the judgment. Therefore, the danger of double liability still existed. Another aspect of interpleader with which the court dealt is the necessity for the existence of a fund which may be paid into court. The respondent urged that the remedy would not lie because under the facts of the case there was no fund in existence and there had been no offer to pay the proceeds into court. The court held that section 507.060 does not require the existence of a definite fund. The question also arose as to the right of the parties to a jury trial in the second stage of the interpleader proceeding. The court held that since interpleader was an equitable remedy, there was no right to a jury trial.³² This view has a twofold significance: (1) in an interpleader action under the Missouri civil code, the parties do not have a right to demand a jury trial; and (2) it is another clear holding by the court that the remedy of interpleader remains

31. 365 Mo. at 171, 280 S.W.2d at 20.

32. This aspect of the decision is discussed in two Notes, 54 MICH. L. REV. 1171 (1956); 1956 WASH. U.L.Q. 264.

equitable in nature, and that, therefore, equitable considerations may arise as a bar to the remedy. There is a dissent in the case to the part of the court's opinion which holds that there is no right to a jury trial. An interesting aspect of the dissenting opinion is that it points out that perhaps, under modern codes, interpleader is not still equitable in nature but merely a procedural joinder matter. This view is similar to that of the committee which drew federal rule 22.³³

Three courts of appeals cases have arisen since the *Plaza Express Co.* case was decided. In *American Life and Acc. Ins. Co. v. Morris*,³⁴ A, an insurance company, had issued a hospital and surgical expenses policy to C₁. C₁ became ill and entered the C₂ hospital. C₁'s husband executed a purposed assignment of benefits of the policy to C₂. C₁ brought an action in magistrate court where A successfully joined C₂ as a third-party defendant. While an appeal from the magistrate action was pending, A brought an interpleader proceeding in circuit court maintaining that the magistrate judgment was not binding on C₂ because the magistrate had no jurisdiction to join a third-party defendant, and that A could still be subjected to the danger of liability to C₂.

The circuit court dismissed the interpleader action and A appealed. On appeal, the St. Louis Court of Appeals held that there is no statutory authority for third-party practice in magistrate court, and that a magistrate is without jurisdiction to hear such an action. C₂ was therefore not bound by the magistrate judgment, and there existed the possibility that the plaintiff could be held doubly liable on the single cause of action. This possibility, of course, is the modern test for interpleader and, since that factual situation existed, A could interplead the claimants.

In *Shaw v. Greathouse*,³⁵ A had damaged a building used as a garage on leased premises. C₁, the landlord, had filed suit in the magistrate court for the damage to her interest and C₂, the tenant, was threatening suit for the losses he had incurred. Faced with multiple claims, A filed a petition in interpleader, maintaining that he might be exposed to multiple liability. The court first pointed out that a landlord and tenant each have separate estates for injuries to which each has a separate cause of action. It concluded that such separate causes of action do not subject the wrongdoer to two recoveries for a single liability. Rather, the separate legal interests of two different persons have been injured by the same act and the wrongdoer is liable to make each whole to the extent of his loss. Interpleader, therefore, did not lie. The case is a good simple illustration of a factual situation that does not meet the test for interpleader in Missouri today. The analysis which the supreme court adopted in the *Plaza Express Co.* case is that one who interpleads must be subject to the possibility of two recoveries for a single liability. The mere fact that a person may be liable to two or more persons does not establish the right to maintain interpleader.

The most recent Missouri case on interpleader is *Badeau v. National Life Acc. Ins.*

33. See note 11 *supra*, and text thereat.

34. 281 S.W.2d 601 (St. L. Ct. App. 1955).

35. 296 S.W.2d 151 (K.C. Ct. App. 1956).

Co.³⁶ This case deals almost entirely with the allowance of costs to an interpleader. A had insured the life of Will Turner, who had died, for \$260. C₁, a funeral director, had obtained a probate court order awarding the policy to him, and he sued on the policy. A interpleaded, and tendered the policy and proceeds into court, maintaining that the insured's daughter, Rosetta Turner, the named beneficiary, was entitled to the proceeds. The purported claimant had made no claim on A and A had no knowledge of her whereabouts. Service by publication was made on Rosetta Turner, as an alleged C₂. The trial court ordered the costs of the litigation paid from the proceeds of the policy, and awarded the balance of proceeds to C₁. C₁ appealed maintaining that the costs should be taxed against A. The usual rule is that a person who has established his right to interplead shall be allowed his costs out of the fund deposited in court. As between the disputed claimants the prevailing party can then usually recover his costs from the parties who do not support their claims. The court held that the interpleader action involved was not a proper one in that it was not shown that the claimant which the interpleader had sought to bring in was in existence and capable of being interpleaded. Since the interpleader was not properly brought, the general rule did not apply, and the court held that the prevailing party, C₁ was entitled to his costs from A.

CONCLUSION

Interpleader in Missouri today is a considerably broadened remedy. Many, if not all of the absolute equitable limitations which restricted its earlier use have been swept aside. The test for the existence of a factual situation in which the remedy will lie, as stated by the Missouri supreme court, is that *there must be the danger of double recovery against A for a single liability*.³⁷ This test excludes the situation of simple double liability; i.e., the mere fact that A is liable to two persons does not give rise to the right to bring an interpleader proceeding.³⁸ It is in the situation in which A is liable to two or more persons on the one liability that the remedy is applicable.

There is no doubt, however, that the remedy is still equitable in nature. The Missouri case law since the passage of the civil code has definitely established this as an inherent characteristic.³⁹ While perhaps it could be argued, as suggested by the advisory committee which drafted federal rule 22, that our interpleader statute which

36. 305 S.W.2d 876 (K.C. Ct. App. 1957).

37. Plaza Express Co. v. Galloway, 365 Mo. 166, 171, 280 S.W.2d 17, 20 (1955) (en banc); St. Louis S.W. Ry. v. Meyer, 364 Mo. 1057, 272 S.W.2d 249 (1954).

38. Shaw v. Greathouse, *supra* note 35, is the best example of a factual situation which illustrates this point. There a tortfeasor was liable to two individuals for his act. Each of the injured parties had suffered a wrong to his own right. The court held that interpleader would not lie.

39. Plaza Express Co. v. Galloway, 365 Mo. 166, 280 S.W.2d 17 (1955) (en banc); St. Louis S.W. Ry. v. Meyer, 364 Mo. 1057, 272 S.W.2d 249 (1954); Barr v. Snyder, 358 Mo. 1189, 219 S.W.2d 305 (1949); Badeau v. National Life and Acc. Ins. Co., 305 S.W.2d 876 (K.C. Ct. App. 1957); Clay County State Bank v. Simrall, 259 S.W.2d 422 (K.C. Ct. App. 1953); John A. Moore & Co. v. McConkey, 240 Mo. App. 198, 203 S.W.2d 512 (K.C. Ct. App. 1947).

is similar to rule 22, is purely a procedural joinder law, our courts have not accepted that view. The principle which the Missouri courts have adopted is that the new provisions have been imposed over the equitable remedy, considerably liberalizing its scope, but leaving it equitable in nature. The effect then of section 507.060 is to abrogate the absolute conditions which were previously applied, and yet to leave with the courts the discretion to apply certain equitable principles as a possible bar to the remedy.⁴⁰ Thus such considerations as laches and collusion among the parties may still stand as a bar to interpleader today.

One further question remains to be discussed—whether any of the four conditions, which Pomeroy stated, are still in effect in Missouri today. The first three elements, identity, privity, and disinterestedness, have clearly been done away with. There these restrictions on interpleader and the Missouri supreme court has so held.⁴¹ These requirements have been replaced by the much simpler and more flexible test of the danger of double recovery for a single liability. Whether the fourth element, freedom from independent liability, still exists is a question on which there is some conflict. Some commentators, although feeling that it should no longer be employed, question whether the statute expressly did away with this factor.⁴² There is federal case authority that it still exists under federal rule 22.⁴³ The Missouri cases, however, hold that it no longer exists. The *Moore* case⁴⁴ and the *Beurger* case,⁴⁵ which is squarely in point, both hold that freedom from independent liability on A's part is no longer necessary. The supreme court has cited both of these cases with approval and its broad language in the *Plaza Express Co.* case⁴⁶ would seem to imply that *all* the absolute equitable requirements, enumerated by Pomeroy, have been swept away by section 507.060.

EUGENE FELDHAUSEN

THIRD-PARTY PRACTICE IN MISSOURI

INTRODUCTION

The Missouri courts at various times have stated the object of third-party practice, sometimes called impleading, to be:

40. *St. Louis S.W. Ry. v. Meyer*, *supra* note 39 (collusion, laches, estoppel, unclean hands); *Barr v. Snyder*, *supra* note 39 (whether the dispute was really or merely colorable); *American Life and Acc. Ins. Co. v. Morris*, 281 S.W.2d 601 (St. L. Ct. App. 1955) (laches).

41. *Plaza Express Co. v. Galloway*, *supra* note 39.

42. *Buder, Interpleader in Missouri*, 7 Mo. L. Rev. 203 (1942).

43. *Hurlbut v. Shell Oil Co.*, 131 F. Supp. 466 (W.D. La. 1955); Note, 65 YALE L.J. 715 (1956).

44. *John A. Moore & Co. v. McConkey*, *supra* note 39.

45. *Beurger v. Costello*, 240 Mo. App. 1194, 226 S.W.2d 610 (K.C. Ct. App. 1949).

46. *Plaza Express Co. v. Galloway*, *supra* note 39.

... "to accomplish ultimate justice for all concerned with economy in litigation and without prejudice to the rights of another."¹
and:

... "to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence."²

The purpose of this Comment is to review Missouri court decisions involving this practice and to determine how these objects are being carried out.

Third-party practice apparently is a creature of statute in the United States.³ The Missouri statute involved is section 507.080, Missouri Revised Statutes (1949). It reads:

1. Before filing his answer, a defendant may move *ex parte* or, after the filing of his answer, no notice to the plaintiff, for leave as a third-party plaintiff to file a petition and serve a summons upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the petition is filed and summons served, the person so served, herein called the third-party defendant, shall make his defenses, counterclaims and cross-claims against the plaintiff, or any other party as provided in this [civil] code. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

2. When a counterclaim is asserted against a plaintiff, he may cause a third-party to be brought in under circumstances which under this section would entitle a defendant to do so.

A few words will be said on the history of this comparatively new type of practice,⁴ but the preponderance of material will deal with the interpretation given the statute by the Missouri courts in the almost 13 years since it became operative. Some federal cases will be referred to, but since only the Missouri statute is being considered, Missouri court decisions will be preferred.

1. *State ex rel. McClure v. Dinwiddie*, 358 Mo. 15, 19, 213 S.W.2d 127, 129 (1948) (en banc); *Camden v. St. Louis Pub. Serv. Co.*, 239 Mo. App. 1199, 1205, 206 S.W.2d 699, 702 (St. L. Ct. App. 1947).

2. *Hipp v. Kansas City Pub. Serv. Co.*, 241 Mo. App. 169, 172, 237 S.W.2d 928, 930 (K.C. Ct. App. 1951).

3. 39 AM. JUR., *Parties* § 84 (1942).

4. For an excellent history of third-party practice, see 1 MOORE, *FEDERAL PRACTICE* § 14.01 (1938).

HISTORY

The type of practice brought into Missouri courts by section 507.080⁵ perhaps can be traced back as far as the old English practice of "vouching to warranty."⁶ However, our modern statutes probably have as their basis the English third-party practice and the procedure developed in the American admiralty courts.

The English statute was first passed as part of the Judicature Act of 1873⁷ and has been amended until it reached its present form.⁸ Without going into a detailed analysis of the statute or English cases interpreting it, it probably could be said that the English statute, even in its present form, is narrower than the Missouri statute.⁹

The practice of impleading was adopted on a limited basis in the United States in 1883 by the old admiralty rule 59.¹⁰ This rule was gradually expanded in scope by court decisions, and now has been replaced by the present rule 56, promulgated in 1920.

A few states passed statutes providing for third-party practice prior to the federal rule. For example, there was the New York statute, first passed in 1923; the Pennsylvania statute, first passed in 1929; and the Wisconsin statute, first passed in 1915.

Rule 14 of the Federal Rules of Civil Procedure was promulgated in 1938. The Missouri statute was taken almost verbatim from federal rule 14 as it existed in 1945¹¹ and remains in its original form. However, the federal rule has been amended

5. All statutory references, unless otherwise indicated, are to RSMo 1949.

6. See note 4 *supra*.

7. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, §§ 66, 24(3), which provided that a defendant could bring in a third party against whom he claimed a right to contribution or indemnity or "other remedy or relief."

8. BALL, BURNAND & WATMOUGH, *THE ANNUAL PRACTICE, Third Party Procedure*, order XVII, rule 1, at 295 (Eng. 1939) which provides:

(1) Where in any action a defendant claims as against any person not already a party to the action (in this Order called the third party)
 (a) that he is entitled to contribution or indemnity or
 (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
 (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, the Court or Judge may give leave to the defendant to issue and serve a 'third-party notice.'

(2) The Court or Judge may give leave to issue and serve a 'third-party notice' or an *ex parte* application supported by affidavit, or, where the Court or Judge directs a summons to the plaintiff to be issued, upon the hearing of the summons.

9. For a detailed analysis of English decisions under this statute, see 1 MOORE, *FEDERAL PRACTICE* § 14.04 (1938).

10. Promulgated March 26, 1883.

11. *State ex rel. McClure v. Dinwiddie*, 358 Mo. 15, 213 S.W.2d 127 (1948).

since that time.¹² These amendments, one, at least, of which seems significant, will be discussed later in this Comment.

Thus, as has been pointed out, the third-party practice spread from the English statute, to the Federal admiralty practice, to a few state courts, and finally to the Federal Rules of Civil Procedure. It is with this historical background that Missouri legislators passed what is now section 507.080.

PASSAGE OF THE MISSOURI STATUTE

The present general Missouri statute on third-party practice was passed in 1943, to take effect January 1, 1945, as section 20 of the code of civil procedure.¹³ It should be noted that there has been a limited type of third-party procedure in Missouri since before 1945 by virtue of what are now sections 73.940, 75.850, and 507.230 which deal with cities impleading third-parties.

INTERPRETATION OF THE FEDERAL RULE

As mentioned before, the Missouri statute was substantially the same as rule 14 of the Federal Rules of Civil Procedure, as it existed at that time. This, of course, meant that there were scores of federal cases interpreting the federal rule on third-party practice, which are applicable to the Missouri statute. However, the value of these to the Missouri courts was diminished due to the inconsistency of federal decisions on certain key points.

It has been said that the federal decisions applying rule 14 can be divided into two classes. One class gives the rule a broad and liberal construction and the other class gives it a narrow and limited construction.¹⁴

INTERPRETATION OF THE MISSOURI STATUTE BY MISSOURI COURTS

There was some speculation¹⁵ (and a few recommendations)¹⁶ as to the manner in which the Missouri courts would interpret their new statute. However, only time has been able to answer that question and perhaps the final result is not known as of this date.

One of the most controversial problems facing the courts in regard to third-

12. The principal amendment has been to strike out the words "or to the plaintiff" in the first sentence of the rule. The sentence reading "The third-party is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff," has been stricken from the federal rules because it states a rule of substantive law and is not within the scope of a procedural rule. These amendments became effective in 1947. *FEDERAL RULES OF CIVIL PROCEDURE* 37-38 (rev. ed. 1947).

13. A complete background on the Missouri code of civil procedure is contained in 1 *CARR, MISSOURI CIVIL PROCEDURE* §§ 1, 2 (1947).

14. 1 *id.* § 69, at 195.

15. See Ruddy, *Joinder of Parties, Claims and Counterclaims*, 1 J. OF MO. BAR 85 (1945); Dabbs, *Third Party Practice Under Missouri Code and Federal Rules*, 2 J. OF MO. BAR 20 (1946).

16. 1 *CARR, MISSOURI CIVIL PROCEDURE* § 69 (1947).

party practice was the effect it would have on our tort law, particularly in the field of contribution. By statute in Missouri,¹⁷ there can only be contribution between joint tortfeasors if there is a joint judgment against them.¹⁸ The introduction of third-party practice in Missouri raised the question whether this substantive law had been altered in any manner.

It will be noted that the Missouri statute allows the impleading of a third-party who is or may be liable to the defendant or to the plaintiff¹⁹ for all or part of the plaintiff's claim against defendant. Reading this alone, it would seem that one joint tortfeasor, who was sued by the injured party, would be able to implead another joint tortfeasor and thus obtain contribution. This would qualify the right, recognized under our statute, of the injured party to select the joint tortfeasor against whom he wishes to obtain judgment.

The federal courts had split upon this precise question in interpreting rule 14.²⁰ There were some in Missouri who felt that the Missouri statute had substantially changed the right of a wronged party to choose which joint tortfeasor to sue. One of the strongest advocates of this view was Charles L. Carr in his work, *Missouri Civil Procedure*.²¹ Mr. Carr strongly advised a liberal interpretation of the new statute, and in conjunction with that view, he felt contribution should be allowed between joint tortfeasors if the trial court permitted the impleading of the other tortfeasor. This, he claimed, would be so whether or not the original plaintiff amended his petition to state a cause of action against the third-party defendant.

It appeared, at least in one case, that the Missouri courts would go along with Mr. Carr's interpretation. In *Camden v. St. Louis Public Service Co.*,²² decided in 1947, the St. Louis Court of Appeals approved quotations from *Missouri Civil Procedure* as stating the effect of the new third-party statute.²³ However, the case was decided on different grounds and its approval became only dictum.

17. § 537.060, RSMo (1949) ("defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. It shall be lawful for all persons having a claim or cause of action against two or more joint tortfeasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tortfeasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tortfeasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released").

18. *Neal v. Curtis & Co. Mfg. Co.*, 328 Mo. 389, 41 S.W.2d 543 (1931).

19. As was noted earlier, the words "or to the plaintiff" have been eliminated from the federal rule. See note 12 *supra*.

20. See *Atlantic Coast Line R.R. v. United States Fidelity & Guaranty Co.*, 52 F. Supp. 177 (M.D. Ga. 1943). *Contra*, *Satink v. Holland Township*, 31 F. Supp. 229 (D.N.J. 1940).

21. 1 CARR, *MISSOURI CIVIL PROCEDURE* § 69 (1947).

22. 239 Mo. App. 1199, 206 S.W.2d 699 (St. L. Ct. App. 1947).

23. *Id.* at 1203, 1204, 206 S.W.2d at 703, 704.

Then, in 1948, only one year later, the Missouri supreme court, sitting en banc, handed down what has probably been the most quoted and cited case in regard to third-party practice in Missouri—*State ex rel. McClure v. Dinwiddie*.²⁴ This was a mandamus proceeding resulting from an original action by an automobile passenger against the driver of another car involved in an accident. The defendant driver of the second automobile moved for leave to implead the driver of the car in which the plaintiff was a passenger in order to obtain contribution. When the original plaintiff objected to this motion, the trial judge refused to rule on it. The mandamus action was brought to force the trial court to exercise its discretion on the filing of the motion.²⁵

In this proceeding the Missouri supreme court considered the third-party statute at some length and answered several, at that time, unanswered questions. The court decided first that it should adopt a liberal construction of the statute; however, it added that it could only interpret the legislation as it was written. It next observed that the granting of a motion to implead is discretionary with the trial court, but that it must use its discretion by ruling on the motion. The court then went on to assert that if a motion to implead was granted and a third-party defendant was brought into the proceeding, it was optional with the original plaintiff whether he would accept the third-party defendant as his defendant and amend his petition to state a cause of action against said third-party defendant. The court also decided that the Missouri third-party statute was only procedural and thus did not change the substantive law of section 537.060. Therefore, there can be no contribution among joint tortfeasors unless there is a joint judgment against them. It follows that the defendant could file a motion to implead a joint tortfeasor subject to the discretion of the court, and the motion might be granted. However, if the plaintiff did not amend his petition to state a cause of action against the third-party defendant, there could be no joint judgment and therefore no contribution.²⁶ The court stated also that even if the plaintiff did amend his petition to add the third-party defendant as a defendant, any time before final judgment he might release the third-party defendant, preventing a joint judgment, and, through the force of the statute, preventing contribution. This line of reasoning meant that in Missouri a joint tortfeasor could only be offered to the original plaintiff and if he refused to accept him as defendant, or later dismissed, there could be no contribution.

The language of the court to the effect that there could be no judgment against a third-party defendant in favor of the plaintiff unless the plaintiff amended his petition to state a cause of action against the third-party defendant, meant that when a defendant alleged the third-party defendant to be liable "to the plaintiff," the plaintiff must amend or the third-party action is useless. When the original plaintiff refuses to amend, there must be a claim of liability from the third-party

24. 358 Mo. 15, 213 S.W.2d 127 (1948) (en banc).

25. The trial judge stated that he was in doubt as to relator's right to bring in the third-party defendant. *Id.* at 18, 213 S.W.2d at 129.

26. For an objection to this line of reasoning, see 1 CARR, MISSOURI CIVIL PROCEDURE § 69 n.36.1 (1952 Supp.).

defendant to the *third-party plaintiff* if there is to be a judgment against the third-party defendant.²⁷ This would seem to make the section of the statute allowing third-party petitions in cases where the third-party defendant is alleged to be liable to the plaintiff a rather useless provision, leaving Missouri, in effect, with a statute similar to the present federal rule which permits a third-party defendant to be brought into a case only if he is or may be liable to the defendant.

The decision in the *McClure* case was expressly contrary to Mr. Carr's views, and he severely criticized the opinion as "frustrating" third-party practice in Missouri.²⁸ His view was not accepted by all Missouri lawyers.²⁹

Clearly, the *McClure* case would have no effect on actions where the defendant properly seeks indemnity for any judgment the original plaintiff should receive from said defendant, for in that case the defendant can recover his full loss against the third-party defendant even though there is no judgment by the plaintiff against the third-party defendant. Thus, a principal was allowed to implead his agent, who caused a loss to the principal, even though the injured party did not state a cause of action against the agent.³⁰

One interesting case³¹ decided shortly before the *McClure* case, held that where the defendant alleged the third-party defendant's negligence was the sole proximate cause of the collision, and the original plaintiff declined to amend her petition to include the third-party defendant, the trial court was within its discretion in refusing the application to permit the defendant to file a third-party petition.

A case decided a few years after the *McClure* case has been said to be contrary in theory.³² This was the case of *Hipp v. Kansas City Public Service Co.*,³³ decided by the Kansas City Court of Appeals in 1951. The defendant in the original action filed a third-party petition, apparently claiming that the third-party defendant was liable to the plaintiff. The plaintiff did not amend to state a cause of action against the third-party defendant. The third-party defendant answered the third-party plaintiff's claim and filed a counterclaim (which the court referred to as a cross-claim) against the third-party plaintiff as allowed by the statute. Subsequently, the original plaintiff settled her claim against the original defendant and dismissed her action. Defendant, therefore, moved to dismiss the third-party petition and the counterclaim. The trial court refused to dismiss the counterclaim and judgment was for the third-party defendant on the counterclaim. This was affirmed by the Kansas City Court of Appeals which stated that the *McClure* case was not in point. Perhaps

27. *State ex rel. Merino v. Rose*, 362 Mo. 181, 240 S.W.2d 705 (1951) (en banc).

28. 1 CARR, *MISSOURI CIVIL PROCEDURE* § 69, at 75 (1952 Supp.). For another criticism of this interpretation, see Crawford, *Third Party Practice Under the Missouri Code*, 19 U. KAN. CITY L. REV. 16, 37 (1951).

29. See Volz and Blackmar, *Beneficial Aspects of the Civil Code of Missouri*, 3 ST. LOUIS U.L.J. 334, 348 (1955).

30. *State ex rel. Algieri v. Russell*, 359 Mo. 800, 223 S.W.2d 481 (1949) (en banc).

31. *Browne v. Creek*, 357 Mo. 576, 209 S.W.2d 900 (1948).

32. 1 CARR, *MISSOURI CIVIL PROCEDURE* § 69 (1952 Supp.).

33. 241 Mo. App. 169, 237 S.W.2d 928 (K.C. Ct. App. 1951).

there are some lines of conflict between the two decisions; however it will take future cases to resolve the problem. A later case decided by the Missouri supreme court³⁴ approved the *Hipp* decision, saying, in reference to the counterclaim, "there was an actual subsisting cause of action presented by the pleadings as between the third-party plaintiff and the third-party defendant."³⁵

Several Missouri cases have dealt with the procedure followed in moving for leave to file a third-party petition. The third-party claim must be against one not already a party to the action.³⁶ However, one modification of that statement might be mentioned. In a St. Louis Court of Appeals case,³⁷ one of the defendants filed a third-party petition against four persons, three of them being strangers to the action, but one of whom was a co-defendant with the third-party plaintiff. The court allowed this procedure, saying the action against the co-defendant was really a cross-claim, and that there was no objection to joining all of the claims in one pleading.

The timing of the motion is extremely important as this could easily be sufficient grounds to reject the motion. The statute allows an *ex parte* motion before the answer is filed, but after the answer, there must be notice to the plaintiff.³⁸ Obviously the motion should be made as soon as possible under the circumstances. The courts have held that the filing of the motion after the defendant has answered and after depositions have been taken is timely.³⁹ However, a motion to be permitted to implead, which was made after the plaintiff had rested has been refused, one reason for the refusal being that to grant the motion would unduly delay the trial.⁴⁰

After the motion is filed, the granting of the motion is a matter of discretion with the trial court.⁴¹ The appellate court will not reverse unless it appears from the whole record that there has been a gross abuse of such discretion.⁴²

If the motion to implead is granted, the defendant must file a petition against the third-party defendant, setting out a cause of action, or, in other words, a claim upon which relief may be granted.⁴³

As would be expected, the third-party claim must arise out of the same transaction, occurrence, or series of transactions or occurrences as the original claim presented against the defendant.⁴⁴

34. *State ex rel. Merino v. Rose*, 362 Mo. 181, 240 S.W.2d 705 (1951) (en banc).

35. *Id.* at 186, 240 S.W.2d at 708.

36. See *Biggs v. Crosswhite*, 240 Mo. App. 1171, 225 S.W.2d 514 (K.C. Ct. App. 1949).

37. *Elzea v. Hammack*, 244 S.W.2d 594 (St. L. Ct. App. 1951).

38. See *Dennis v. Creek*, 211 S.W.2d 59 (K.C. Ct. App. 1948).

39. *State ex rel. McClure v. Dinwiddie*, 358 Mo. 15, 213 S.W.2d 127 (1948) (en banc).

40. *Biggs v. Crosswhite*, *supra* note 36.

41. *State ex rel. McClure v. Dinwiddie*, *supra* note 39.

42. *Stanley v. Ray*, 220 S.W.2d 75 (Spr. Ct. App. 1949).

43. *Byrnes v. Scaggs*, 247 S.W.2d 826 (Mo. 1952).

44. *Hipp v. Kansas City Pub. Serv. Co.*, 241 Mo. App. 169, 237 S.W.2d 928 (K.C. Ct. App. 1951).

A copy of the petition along with a summons must be served on the third-party defendant. It would probably be good practice to serve a copy on the plaintiff as well, since the plaintiff should be kept informed of the proceedings in the case, but this is not required. One danger in regard to service was brought out in a 1953 St. Louis Court of Appeals case.⁴⁵ In that case the court held that the third-party statute did not extend the venue statute,⁴⁶ and that the service of a summons upon a third-party defendant in her home county which was not the county where the principal case was being held, did not confer jurisdiction on the court over said third-party defendant. The reason for this holding was that a defendant has a right to be sued, in the county in which he is domiciled, if he is served there. This case treats a third-party action as distinct from the original proceeding. This holding seems to be contrary to the majority federal holding that the third-party action is ancillary to the principal case.⁴⁷

The third-party defendant must answer the third-party petition and make his defenses or run the risk of a default judgment. He may assert any defenses which the third-party plaintiff has to the plaintiff's claim. He may also file counterclaims and cross-claims, and third-party motions against parties not already in the case, in accordance with the rules herein discussed. As mentioned before, the plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. It should also be noted that a plaintiff may file a third-party motion, if a counterclaim is asserted against him.

The third-party statute also contains a provision that the third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. This provision has been removed from the federal rule on the ground that it stated a rule of substantive law and had no place in a procedural rule.

One other problem in relation to procedure deals with magistrate courts. By statute,⁴⁸ the code of civil procedure in Missouri applies only to the supreme court, courts of appeal, circuit courts, and common pleas courts. Therefore, there is no authority for such a procedure as third-party practice in the magistrate courts.⁴⁹ The situation is not changed if the magistrate proceeding is appealed to the circuit court, since the circuit court's jurisdiction on such an appeal is only derivative and does not exceed that possessed by the magistrate court.⁵⁰

45. *Memphis Bank & Trust Co. v. West*, 260 S.W.2d 866 (St. L. Ct. App. 1953).

46. § 508.010, RSMo 1949.

47. 1 MOORE, *FEDERAL PRACTICE* § 14.08, at 781 (1938).

48. § 506.010, RSMo 1949.

49. *Liberty Import Corp. v. Neuman*, 234 S.W.2d 227 (K.C. Ct. App. 1950).

50. *Ibid.*

SUGGESTED AMENDMENTS

There have been certain changes proposed in the present Missouri statute, and a short discussion of them seems fitting. It has been proposed to amend the statute in the manner in which the federal rule was amended; i.e., by striking out the words "or to the plaintiff." As mentioned before, this provision has become no more than permission for the defendant to offer this type of third-party defendant to the plaintiff. Therefore, no great loss would be suffered by the proposed amendment.

One other proposed change is that the granting of the motion to file a third-party petition be made compulsory instead of being left to the discretion of the court. It appears that at all times the Missouri courts have used this discretion carefully and never with gross abuse. Therefore, in the interest of flexibility, which is one of the strong points of third-party practice, it is submitted that the present rule on this point will better carry out the objects of Missouri impleader, than would the rule if it were amended as proposed.⁵¹

CONCLUSION

There is clearly some disagreement whether or not the Missouri courts have been carrying out the purposes of third-party practice as set out at the beginning of this Comment. It would appear that within the framework of procedural law in Missouri, and without disturbing substantive law, the purposes have been fulfilled by the decisions.⁵²

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51. For a contrary view, see Volz and Blackmar, *Beneficial Aspects of the Civil Code of Missouri*, 3 ST. LOUIS U.L.J. 334, 348 (1955).

52. In agreement is Volz and Blackmar, *supra* note 51. For contrary views see 1 CARR, *MISSOURI CIVIL PROCEDURE* § 69, at 75 (1952 Supp.), and Crawford, *Third Party Practice Under the Missouri Code*, 19 U. KAN. CITY L. REV. 16 (1951).